05-15042

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD J. BEARDSLEE, Plaintiff and Appellant, **v.** **JEANNE WOODFORD, Director and JILL BROWN, Warden,** Defendants and Appellees.	**CAPITAL CASE**

On Appeal from the United States District Court
for the Northern District of California
No. C 04-5381 JF
The Honorable Jeremy Fogel, Judge

APPELLEES'S BRIEF AND OPPOSITION TO MOTION FOR STAY OF EXECUTION

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Donald Beardslee is scheduled to be executed on January 19, 2005. He was sentenced to death in 1984 by San Mateo County for crimes committed in 1981. To date all of his state and federal appeals and collateral challenges to the judgment have been rejected. On December 20, 2004, after the execution date was set, Beardslee filed a complaint pursuant to 42 U.S.C. § 1983 claiming that execution by lethal injection under the California state procedures constitutes cruel and unusual punishment in violation of the Eighth Amendment. Beardslee further alleged that the state procedures would violate his First Amendment right of free speech by denying him the opportunity to complain of any pain he might

be suffering. In conjunction with the complaint Beardslee filed a motion for temporary restraining order (TRO) and preliminary injunction.

Following briefing and argument the district court denied a TRO and preliminary injunction in a written order filed January 7, 2005. ER 670-676.[1/] The district court found that Beardslee's complaint was materially indistinguishable from the application for injunctive relief it had rejected less than a year earlier in *Cooper v. Rimmer*, No. C 04-436 JF; ER 549-564.[2/] Beardslee now seeks further review of the order in his case and asks this Court to stay his execution. The district court order should be affirmed; the request for stay should be denied.

PROCEDURAL HISTORY

Beardslee was convicted in San Mateo County Superior Court for the first degree murders of Patty Geddling and Stacy Benjamin, both of which were committed in April 1981. He was sentenced to death for the Geddling murder and to life without parole for the Benjamin murder in March 1984. The California Supreme Court affirmed the judgment in March 1991. *People v. Beardslee*, 53 Cal.3d 68, 279 Cal.Rptr. 276 (1991). That court subsequently denied two state

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1. ER designates the three volumes of Excerpt of Record filed with the opening brief.

2. This Court affirmed the district court order in *Cooper v. Rimmer*, 379 F.3d 1029 (9th Cir. 2004); ER 738-741.

habeas corpus petitions challenging the judgment.

In October 1992, Beardslee initiated federal habeas corpus proceedings in the United States District Court for the Northern District of California. In a series of unpublished orders issued in 1999, the district court dismissed or granted respondent's motion for summary judgment on the majority of Beardslee's claims. It denied the remaining claims in April 2001 following an evidentiary hearing. *Beardslee v. Woodford*, C 93-3990 SBA.

This Court affirmed the denial of relief and denied rehearing and rehearing en banc. *Beardslee v. Woodford*, 358 F.3d 560 (9th Cir. 2004). The Supreme Court denied certiorari, *Beardslee v. Brown*, 125 S.Ct. 281 (2004), and rehearing. *Beardslee v. Brown*, 125 S.Ct.647 (2004). The Court subsequently issued an expanded COA and ordered supplemental briefing and argument. It again denied relief on December 29, 2004, *Beardslee v. Brown*, ___ F.3d ___, 2004 WL 3019188 (9th Cir. 2004), and denied rehearing and rehearing en banc on January 6, 2005.

Following denial of certiorari the San Mateo County Superior Court scheduled a hearing to set an execution date. The attorney who had been representing Beardslee for several years in federal court, and continues to represent him in this proceeding, complained that he had not been appointed as

state counsel. He also expressed concerns about payment and his lack of experience in handling a clemency application. The California Supreme Court stayed the setting of an execution date and appointed the Habeas Corpus Resource Center (HCRC) as counsel for any further state post-conviction or clemency proceedings. The state court vacated the stay on November 22, and the San Mateo District Attorney scheduled a new hearing for December 16, 2004. After efforts to stay that hearing failed, the state court set Beardslee's execution for January 19, 2005. Beardslee filed his complaint challenging the use of lethal injection on December 20. The district court denied his motion for injunctive relief on January 7, 2005.

STANDARD OF REVIEW

In considering whether to grant injunctive relief the district court was required to determine whether Beardslee had shown either (1) a likelihood of success on the merits and the possibility of irreparable harm, or (2) the existence of a serious question going to the merits and the balance of hardships tipping in his favor. *Roe v. Anderson*, 134 F.3d 1400, 1401-1402 (9th Cir. 1998). This Court reviews the denial of a preliminary injunction for abuse of discretion. *Harris v. Board of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2004). A district court abuses its discretion when it bases its decision on an erroneous legal

standard or on clearly erroneous findings of fact. *Id.* The Court's review of a decision on a request for preliminary injunction is "limited and deferential." *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc). It does not review the merits of the case but is limited to determining whether the district court applied appropriate legal standards and correctly apprehended the law with respect to the underlying issues. *Harris*, 366 F.3d at 760.

The Court must also consider the application of its decision in *Cooper v. Rimmer*, 379 F.3d 1029, which found that denial of injunctive relief in light of the record in that case was not an abuse of discretion. That opinion is law of the circuit, *Beardslee v. Brown*, 2004 WL 3019188 at *4, and was properly perceived by the district court as "binding precedent." ER 672. Because Beardslee's showing was, as the district court found, materially indistinguishable from the showing in *Cooper*, denial of injunctive relief could not be an abuse of discretion.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING BEARDSLEE'S MOTION FOR INJUNCTIVE RELIEF

The central issue for this Court is the extent to which, if at all, Beardslee is able to distinguish his case from the claims found wanting in *Cooper v. Rimmer*, 379 F.3d 1029 (9th Cir. 2004). Although Beardslee insists that *Cooper* was wrongly decided, AOB at 20, effectively conceding that his showing is no better than the one made in that case, he also argues at great length why nothing in the Cooper litigation should preclude him from obtaining injunctive relief, the differences Beardslee perceives are more ephemeral than real.

A. Delay

Because Beardslee seeks to enjoin the execution of a final state criminal judgment, a federal court "must take into account the State's strong interest in proceeding with its judgment and [any] obvious attempt at manipulation." *Gomez v. United States District Court for Northern District of California*, 503 U.S. 653, 653-654 (1992) (per curiam). Citing *Gomez*, the Supreme Court emphasized last term in *Nelson v. Campbell*, 124 S.Ct. 2117 (2004), that before granting a stay of execution a federal court must consider "not only the likelihood of success on the merits and relative harms to the parties, but also the extent to which the inmate

had delayed unnecessarily in bringing the claim." There is a "strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." 124 S.Ct. at 2126. As in *Cooper*, the district court "properly weighed undue delay in the balance of equities." 379 F.3d at 1032.

The complaint in this case was not filed until December 20, 2004, after an execution date had been set. While not as delayed as the complaint filed in *Cooper*, the district court recognized at argument on Beardslee's motion for injunctive relief that reaching the merits of his claims would necessarily require the issuance of an injunction. ER 710-71. Thus, while the "avowed purpose" of Beardslee's complaint was to address "alleged deficiencies in the lethal injection protocol, the timing of [his] action suggests that an equally important purpose is to stay his execution . . . ." *Cooper v. Rimmer*, 379 F.3d at 1031. As the district court observed in denying the motion, "although [Beardslee] has been somewhat more diligent than Cooper, he still must make a showing of serious questions going to the merits that is sufficient to overcome [the] strong presumption" against a stay of execution to review the merits of a claim that could have been brought earlier. ER 672. Beardslee offers two excuses for his delay in bringing this claim; neither is persuasive.

First, he argues that it was necessary to exhaust his administrative remedies, as required by 42 U.S.C. § 1997e(a). Although this requirement was part of the Prison Litigation Reform Act, enacted by Congress in 1996 while Beardslee was still litigating his federal habeas corpus petition, Beardslee made no effort to begin the process of administrative review until November 24, 2004, after the California Supreme Court authorized the State to set an execution date. ER 642; AOB 26. Given the amount of time during which Beardslee could have completed the administrative review, his insistence that waiting as long as he did demonstrates a timely effort rings hollow.

Second, Beardslee insists that he could not challenge the method of execution until he was served with an execution warrant, citing this Court's opinion in *Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998). He is wrong. California Penal Code § 3604(b), as amended in 1996, *see* Stats. 1996, ch. 84, provides that lethal gas or lethal injection may be used as the method of execution. The condemned inmate is entitled to make a choice when the execution warrant is served, but unless he selects lethal gas, lethal injection will be used. In *Fierro* the Court held that condemned inmates lack standing to challenge the use of lethal gas prior to the setting of an execution date as that method may never be used. 147 F.3d at 1160. The holding does not preclude a challenge to lethal injection,

however, as that method will be used absent a specific, contrary selection by the inmate. Beardslee could have presented this challenge long ago.[3/]

Even before the Cooper litigation claims similar to those raised by Beardslee were being presented in other state and federal courts. *See, e.g., State v. Webb*, 252 Conn. 128, 750 A.2d 448, *cert. denied* 531 U.S. 835 (2000) (claim lethal injection creates a "high risk" inmate will experience "excruciating pain" because execution protocol does not ensure sufficient amount of thiopental sodium will be administered to render inmate inconscious); *Sims v. State*, 754 So.2d 657 (Fla.), *cert. denied*, 528 U.S. 1183 (2000) (claim lack of specific guidelines controlling the dosage, sequence, and delivery rates of lethal chemicals violates Eighth Amendment). Beardslee's failure to proceed in a timely manner weighs heavily against the granting of any injunctive relief.

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3. Beardslee contends that counsel would have no incentive to file a § 1983 action while habeas corpus proceedings are pending as counsel might not get paid. AOB at 27, n. 5. He ignores, of course, that the claim was properly recognizable on habeas, *and was in fact raised in that proceeding* by the attorney now representing him in this civil action. ER 572-575. Although this Court approved the use of § 1983 to challenge a method of execution in *Fierro*, 77 F.3d at 305-306, it has also resolved challenges to execution methods in habeas corpus proceedings, most notably *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994) (upholding constitutionality of hanging).

B. Merits

In denying injunctive relief the district court observed that "[a]s a general matter, [Beardslee's] arguments and evidence are substantially the same as Cooper's." ER 673. Indeed, except for augmenting his factual showing with some minor additional evidence and superficially recasting one constitutional predicate for his claim, Beardslee's complaint and motion for injunctive relief are identical to the pleadings filed in *Cooper*. *See* ER 581-619. Beardslee vehemently contends otherwise. He is wrong.

In its opinion affirming the denial of injunctive relief in *Cooper*, the Court noted that it had "previously upheld the constitutionality of lethal injection as a method of execution," and observed that at least two states had rejected such claims under procedures similar to California but with "lesser dosages of anesthesia." 379 F.3d at 1033. While acknowledging "there can be no guarantee error will not occur," the Court held that Cooper fell "short of showing that he is subject to an unnecessary risk of constitutional pain or suffering such that his execution by lethal injection under California's protocol must be restrained." *Id.* at 1033. Beardslee makes no showing that the protocol to be used in his execution has changed since the Cooper litigation. Indeed, his extensive duplication of

Cooper's complaint and motion effectively concedes they are the same.[4/] Beardslee's motion for injunctive relief, like Cooper's, was properly dismissed.

Before turning to the ways in which Beardslee believes his showing is distinguishable from Cooper's, we note one significant difference he apparently hopes to avoid. Like Cooper (and a great many other death row inmates across the country) Beardslee relies on a declaration from Dr. Mark Heath to support his challenges to the drugs used and to the execution protocol. Unlike in the Cooper litigation, however, Dr. Heath now concedes that the five-gram dose of sodium pentothal administered as the first drug in the execution process is itself a fatal dose. "[I]t is more than sufficient to cause unconsciousness and, eventually, would cause death if no resuscitation efforts were made." ER 62-63. The doctor's attempt to avoid the consequences of this conclusion by raising questions about

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4. Indeed, counsel admitted as much at the hearing in district court:

> THE COURT: Basically, though, you're saying ultimately that the Court should simply take, on this point at least, the same evidence that it had in the *Cooper* case [referring to complaints about the procedures used to implement the execution] and reach a different conclusion even though the Ninth Circuit found that conclusion to be correct at this procedural stage.
>
> MR. LUBLINER: Given the slant that we have put on it I would say, yes, yes, that's true.

ER 728. *See also* ER 702 (counsel admitted that with respect to the California evidence Beardslee's claim rested "on the same evidence" used in Cooper).

the California execution protocols is identical to the showing made in *Cooper* and found by both the district court and this Court to be wanting.

The assumption underlying Beardslee's complaint, like the numerous similar actions brought in other states, is that the condemned will not remain sedated while the additional, allegedly painful, drugs are administered. In *Cooper* this Court noted the widespread acceptance of lethal injection as a valid method of execution. This procedure is used by 37 of the 38 states with the death penalty, 27 of which use the same combination of drugs as California. *Cooper*, 379 F.3d at 1033; Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 Ohio St. L.J. 63, 146 (2002). To date no court in any state has found lethal injection or the drugs used in such executions to be constitutionally suspect. *See, e.g., Sizer v. Oken*, 124 S.Ct. 2868 (2004) (vacating stay of execution entered by district court based on challenge to lethal injection protocols; Oken was executed June 17, 2004); *Aldrich v. Johnson*, 388 F.3d 159 (5th Cir. 2004) (denying stay of execution based on challenge to lethal injection protocol; Aldrich was executed October 12, 2004); *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004) (denying stay of execution based on challenge to lethal injection procedure; Harris was executed June 30, 2004); *Reid v. Johnson*, 333 F.Supp.2d 543 (E.D. Va 2004)

(denying injunction based on challenge to lethal injection procedures and combination of drugs); *Reid v. Johnson*, 125 S.Ct. 25 (2004) (denying injunction; Reid was executed September 9, 2004). We turn now to the ways in which Beardslee hopes to distinguish his case.

1. Reliance Upon Autopsy Reports From Executions In Other States

Cooper argued in reliance on the declaration of Dr. Heath that the first drug, sodium pentothal, which is used to induce unconsciousness, could wear off, causing the prisoner to experience extreme pain when the third drug, potassium chloride is injected. He claimed the second drug, pancuronium bromide, would paralyze him but not prevent him from experiencing the pain. Defendants submitted a declaration from Dr. Mark Dershwitz who demonstrated that all but an infinitesimally small number of people would be rendered unconscious within sixty seconds after administration of the dosage of sodium pentothal (or thiopental sodium as it is also called). "[V]irtually every person given five grams of thiopental sodium will have stopped breathing prior" to injection of the second, paralytic, drug. *Cooper*, 379 F.3d at 1032. In conjunction with his declaration Dr. Dershwitz prepared charts demonstrating the likelihood of consciousness based on the blood concentration of sodium pentothal. The doctor concluded that the

amount given in California "would render most people unconscious for a period in excess of 13 hours," substantially longer than any lethal injection in any state has lasted. ER 238.

Beardslee also relies on Dr. Heath whose declaration is identical to the one submitted by Cooper with two exceptions. One, as discussed above, is his admission that the amount of sodium pentothal is fatal. The second relates to toxicology reports completed after executions in other states and since reviewed by Dr. Heath. Conceding that no autopsy or toxicology reports exist for any California execution, ER 65, Dr. Heath nonetheless asserts that the sodium pentothal levels reported after death raised "grave" or "serious" concern the inmates were conscious during the executions. ER 65-66. In his motion Beardslee goes so far as to place the information from the other state executions on a copy of the chart prepared by Dr. Dershwitz in Cooper and concludes: "What [these results] suggest is that prison officials are not properly trained to administer anesthesia in prisoners, and that they will likely suffer an excruciatingly painful death as a result." ER 39. They show no such thing. Although Cooper did not include the information from other states in his complaint, this is not the first time a death row inmate has made use of that information.

In *Reid v. Johnson*, 333 F.Supp.2d at 546-548, the district court concluded in reliance on a declaration from Dr. Dershwitz that the *two* grams of sodium thiopental used in Virginia would assure the inmate's unconsciousness. Reid sought to overcome that conclusion through reliance on Dr. Heath's consideration of "post-mortem blood toxicology reports of condemned inmates from other states," which, according to the doctor, raised a "possibility that the inmate may have been conscious during his execution." We set forth in full the district court's rejection of that argument:

> The lack of pertinent information regarding when and how the blood was gathered renders these reports of little value as a basis for rendering an opinion based on reasonable medical certainty as to the amount of sodium thiopental that had actually reached the inmate's system. Any probative value of the toxicology reports was further diminished by the lack of information regarding the specific chemicals used to execute the inmate described in the report and the unexplained presence of other sedatives. In short, the sodium thiopental level found in the toxicology report for a particular inmate is not indicative of the consciousness of that inmate during his execution, much less probative of whether a condemned Virginia inmate will be conscious throughout his execution.

333 F.Supp.2d at 548.[5/]

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5. Beardslee asserts that Dr. Dershwitz found the poat-execution blood levels of sodium pentothal in a Kentucky case "troubling." AOB at 13; ER 225. Assuming the propriety of relying upon statements quoted in a newspaper article, Beardslee fails to include the doctor's additional comment that without knowing how the autopsies were performed or the blood samples drawn, the blood level information was "just uninterpretable." ER 225. It still is as the district court found in *Reid*.

The defects *Reid* are just as obvious in Beardslee's complaint. Beardslee makes no effort to demonstrate how much of the drug was actually administered in each of the executions, how long the execution lasted, or how long after death the autopsy or toxicology studies were done. Dr. Heath's professed concerns, which seem to evolve from case-to-case and state-to-state, do not establish a showing of irreparable injury sufficient to warrant a stay of execution. The district court in Virginia found "the chance that Reid will be conscious of any pain associated with the second two drugs of his death is less than 6/1000 of one percent." 333 F.Supp.2d at 551. That percentage is even lower here inasmuch as Beardslee will be given more than twice the amount of sodium thiopental used in Virginia. The "likelihood of [Beardslee] suffering irreparable harm from the manner in which the defendants intend to carry out his sentence is so remote as to be nonexistent." *Id.* Because Beardslee adds nothing to the showing made by Cooper, he provides no reason for this Court to grant him the injunctive relief rejected in *Cooper*.

2. Alleged Violation Of First Amendment Rights

In what the district court characterized as a "novel argument," ER 674, Beardslee contends that he has a First Amendment right to communicate information about failures in the execution protocols. He alleges that injection of

pancuronium bromide, the second drug used in the execution procedure, will paralyze his voluntary muscles and thus violate his free speech rights. This assertion is in turn based on the allegation that the concededly fatal dose of sodium pentothal will not render him fully unconscious and that he will thus suffer intense pain when injected with the third drug, potassium chloride.

Despite Beardslee's insistence that the First Amendment claim substantially distinguishes his case from Cooper's, it clearly does not. The claim is based entirely on the assumptions underlying his Eighth Amendment claim, namely that he will be conscious and in pain but unable to communicate during the execution. As the district court observed, Beardslee, "like Cooper, has done no more than raise a concern that errors may be made during his execution that could expose him to risk of unnecessary pain. Based upon the present record, a finding that there is a reasonable possibility that such errors will occur would not be supported by the evidence." ER 675. That, of course, is precisely the finding made by this Court in *Cooper*. 379 F.3d at 1033. Because Beardslee cannot make a showing sufficient to warrant injunctive relief on his Eighth Amendment claim, his First Amendment claim provides no independent basis for such relief. Nothing in the cases and litigation upon which he relies, AOB at 46-50, suggests otherwise.

CONCLUSION

For the reasons stated above, the order denying injunctive relief should be affirmed and the motion for stay of execution should be denied.

Dated: January 11, 2005

Respectfully submitted,

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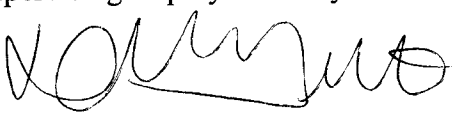

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STATEMENT OF RELATED CASES

The following related case is pending in this Court:

1. *Beardslee v. Brown*, 01-99007.

Dated: January 11, 2005

Respectfully submitted,

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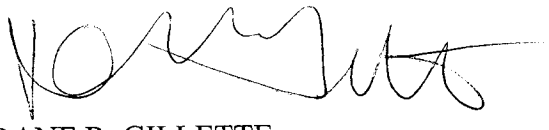
Attorney General of the State of California



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Respectfully submitted,

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DECLARATION OF SERVICE BY FACSIMILE

Case Name: **Donald J. Beardslee v. Woodford** No.: **05-15042**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, , San Francisco, California 94102-7004. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business. My facsimile machine telephone number is (415) 703-1234.

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